

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA) CAUSE NO. 3:04-CR-240-P
(
vs.)
(SEPTEMBER 18, 2008
(DALLAS, TEXAS
HOLY LAND FOUNDATION, ET AL (9:00 A.M.

VOLUME 5 of 37

STATEMENT OF FACTS

BEFORE THE HONORABLE JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE
and a jury

A P P E A R A N C E S

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
1100 COMMERCE, 3RD FLOOR
DALLAS, TEXAS 75242
BY: MR. JIM JACKS
MR. BARRY JONAS
MS. ELIZABETH SHAPIRO

FOR THE DEFENDANT: FREEDMAN, BOYD, HOLLANDER,
(SHUKRI ABU BAKER) GOLDBERG & IVES, P.A.
20 FIRST PLAZA, SUITE 700
ALBUQUERQUE, NEW MEXICO 87102
BY: MS. NANCY HOLLANDER
MS. TERESA DUNCAN

1 FOR THE DEFENDANT: LAW OFFICE OF JOSHUA L. DRATEL
2 (MOHAMMAD EL-MEZAIN) 14 WALL STREET, 28TH FLOOR
3 NEW YORK, NEW YORK 10005
4 BY: MR. JOSHUA DRATEL
5 MR. AARON J. MYSLIWIEC

6 FOR THE DEFENDANT: LAW OFFICE OF MARLO P. CADEDDU
7 (MUFID ABDULQADER) 3232 MCKINNEY AVENUE, SUITE 700
8 DALLAS, TEXAS 75204
9 BY: MS. MARLO P. CADEDDU

10 FOR THE DEFENDANT: LAW OFFICE OF LINDA MORENO
11 (GHASSAN ELASHI) P.O. BOX 10985
12 TAMPA, FLORIDA 33679
13 BY: MS. LINDA MORENO

14 JONES DAY
15 555 CALIFORNIA ST., 26TH FLOOR
16 SAN FRANCISCO, CA 94104
17 BY: MR. JOHN D. CLINE

18 FOR THE DEFENDANT: WESTFALL, PLATT & CUTRER
19 (ABDULRAHAM ODEH) ONE SUMMIT AVENUE, SUITE 910
20 FORT WORTH, TEXAS 76102
21 BY: MR. GREG WESTFALL

22 COURT'S LAW CLERK: MS. JENNIFER HELMS
23 1100 COMMERCE, RM. 1654
24 DALLAS, TEXAS 75242.

25 COURT COORDINATOR: MS. BRENDA WEBB
 1100 COMMERCE, RM. 1654
 DALLAS, TEXAS 75242

 OFFICIAL COURT REPORTER: SHAWN M. McROBERTS, RMR, CRR
 1100 COMMERCE STREET, RM. 1654
 DALLAS, TEXAS 75242
 (214) 753-2349

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1 THE COURT: Good morning.

2 Well, I think we are down to the jury method selection I
3 think is where we are.

4 Mr. Jacks, you are still objecting to the method proposed
5 by the Defense?

6 MR. JACKS: Yes, Your Honor. And I can explain
7 further if you would like me to about why I believe --

8 THE COURT: Maybe at another point. I am going to
9 do the traditional method of striking, so we will let you take
10 your break.

11 How much time are going to need to make your strikes.

12 MR. WESTFALL: Not very much, Your Honor. We gave
13 it some thought last night.

14 THE COURT: Then go ahead and recess and make your
15 selections, turn in the list to Brenda, and we will come
16 in -- Each of you will have --

17 MR. JACKS: Just use this list.

18 MR. WESTFALL: We need to get a new one, and I guess
19 what we have to do is see if there were double strikes and
20 that will determine our alternate pool.

21 THE COURT: We will compile the list and the
22 alternate pool, and then we will let you see it and make sure
23 we are all in agreement that that is the jury we need to seat.

24 MR. WESTFALL: And then exercise our strikes on the
25 alternate pool?

1 THE COURT: That is a good point. On your first 15
2 strikes and your 9 strikes go on the first 36. That is our
3 pool for the primary jury. And then you have 37 through 44,
4 and that is your four strikes, two strikes each on that. So
5 those four will be the alternate.

6 MR. WESTFALL: Okay. So if we have double strikes
7 and then there are jurors left --

8 THE COURT: They are just out. That is the way I do
9 it. So that is the pool for the jury, and so the alternate
10 pool will be the last eight. Otherwise we wouldn't need the
11 last eight. That is the way I do that.

12 Some thoughts? I see some puzzled looks.

13 MS. HOLLANDER: Yes. I understand that. But do we
14 do the first one --

15 THE COURT: Just do it all at once, once you turn in
16 your 15 strikes and your two strikes.

17 MR. WESTFALL: We look at them as though they are
18 two separate pools.

19 THE COURT: But do your strikes all at once. So
20 once we get the jury list we will have it all, the 12 and the
21 4. Everybody on the same page?

22 MR. WESTFALL: Yes, Your Honor.

23 MR. JACKS: Just to confirm, the highest number --

24 THE COURT: I didn't count the 36, where No. 36 is.
25 What did you show?

1 MS. HOLLANDER: No. 76.

2 MR. JACKS: That is the highest one in the regular
3 pool, and the alternate runs from 78 to 98.

4 MS. MORENO: No. 76 is where it ends.

5 MS. HOLLANDER: And the alternate pool ends at 98,
6 Rainwater?

7 THE COURT: That is what we are showing.

8 MR. WESTFALL: Did we want to confirm the numbers or
9 anything?

10 THE COURT: Do you want to do that? Let me do this.
11 Why don't you get together and see if you agree. If you agree
12 -- Well, Brenda has the list as well.

13 MR. WESTFALL: Let's look at Brenda's list.

14 THE COURT: We will take a look -- You can look at
15 that together before you adjourn, then, to make your strikes.

16 MS. HOLLANDER: Your Honor, could we have the
17 courtroom to do it so we can meet with our clients?

18 THE COURT: That is fine.

19 And Mr. Jacks, you can come into the jury room, if that
20 is where you want to go, or whenever you need to go.

21 MS. MORENO: Is there a time limit?

22 THE COURT: No. We don't want to take all morning,
23 but just let us know when you are finished.

24 We are in recess.

25 (Brief Recess.)

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THE COURT: All right. It looks like we have a jury. And the lawyers have looked, and everybody is in agreement that this is the panel. Correct, Mr. Jacks?

MR. JACKS: Yes.

THE COURT: Any objections from the Defense?

MS. HOLLANDER: No.

THE COURT: We will start with the jury at 9:00 Monday morning.

We will be back at 2:00 this afternoon to look at the motions in limine. Hopefully by 2:00 I will get a chance to work my way through all of your motions.

Anything else, then, before we recess, Mr. Jacks?

MR. JACKS: No, sir.

MR. CLINE: One question from the audience here. Do you expect to entertain any argument at all this afternoon, or will you simply --

THE COURT: I may hear on some of those that I need to hear on, so be prepared -- I am not going to hear argument as a matter of course on every motion. Some I am prepared to rule on.

We will see you at 2:00 this afternoon.

(Lunch recess.)

THE COURT: All right. On the record now.

We have had a discussion with counsel and the Court off

1 the record. After we selected the jury this morning, two
2 members of the panel, one on the 12 and then one of our
3 alternates, had sent in some information regarding being
4 excused--one on a hardship employment, and another one sent in
5 a note from her doctor indicating she was totally
6 incapacitated and should be excused from jury service.

7 So my proposal was to excuse both of these jurors, and
8 then substitute some of the other panel members that were not
9 stricken by either side.

10 And so counsel have now had a little bit of time to think
11 about this and consider what we discussed, and I will hear
12 from Mr. Jacks.

13 MR. JACKS: Your Honor, that is fine. We have no
14 problem.

15 THE COURT: To Ms. Strong and Ms. Kirk?

16 MR. JACKS: Correct.

17 MR. WESTFALL: We have no objections either.

18 THE COURT: So Ms. Strong is the first juror of the
19 two that were not stricken, No. 72, so she will take Ms.
20 Hoff's place and be one of the 12. And then Ms. Kirk will be
21 an alternate.

22 And there was a question as to which alternate is she.

23 MR. WESTFALL: Whether she is No. 1 --

24 THE COURT: My thinking was she has to be No. 1,
25 because we normally take them in order, or at the worst she

1 would have to replace the alternate juror she is replacing, so
2 she would become the third alternate.

3 My thinking would be logically, since everyone is taken
4 in order, she would be No. 1.

5 Mr. Jacks, any thoughts on that?

6 MR. JACKS: That is fine, Your Honor.

7 THE COURT: Mr. Westfall.

8 MR. WESTFALL: No.

9 THE COURT: That will be the way we do it, then.

10 Ms. Strong will become our juror of the 12, and Ms. Kirk will
11 become alternate No. 1, and then Mr. Mijares and Mr. Cook will
12 move down to 14 and 15. Okay?

13 Any other issues on that that we need to address.

14 MR. WESTFALL: Not on that, but let's keep our
15 fingers crossed.

16 THE COURT: That is our new jury for now. We hope
17 it will be that way a week or two from now.

18 Let's take up the motions in limine, then.

19 Mr. Jacks, let's take up your motions first, the
20 Government's motions. Are you going to be addressing the
21 Government's motions?

22 MR. JACKS: Yes, unless I call in a relief person.

23 THE COURT: Unless you punt? Okay.

24 As I understood, there were three parts to yours. Really
25 the first one under jury nullification you are actually

1 objecting to any evidence of Israeli government -- arguing
2 jury nullification, but tied in that is evidence of Israeli
3 Government misconduct that the Defendants may be offering.

4 MR. JACKS: Yes, Your Honor, I think that is one way
5 to describe it. The Government, as it stated to the Court and
6 to prospective jury members, doesn't believe this trial should
7 be about the Palestinian-Israeli conflict and who is right or
8 who is wrong in that particular conflict. And I know from the
9 previous trial from the first opening statement there was
10 discussion about the number of Israeli settlements, and there
11 was a map that was shown to the jury that showed where Israeli
12 settlements were in the West Bank and Gaza, and just from that
13 point on it seemed like so much of the Defense evidence had to
14 do with allegations or evidence that was characterized or can
15 obviously be characterized as things that the Government of
16 Israel has done to the Palestinian people.

17 And we believe that that is being offered essentially to
18 attempt to make this jury believe that, well, you know, the
19 Israeli Government has done things wrong and in essence
20 whatever these Defendants are accused of doing, or whatever
21 Hammas is accused of doing, you know, the jury should basically
22 just ignore whatever evidence, other evidence there is, and
23 just, you know, kind of say, "Well, I don't care what the
24 evidence is. Both sides are wrong and we are just not going
25 to get involved, or we are not going to really look at the

1 evidence to see if the charges are proven, and that we are
2 just going to throw up our hands and nullify that."

3 Now, the Defendants in their response have said, "Well,
4 this goes to show why the Defendants did what they did, and
5 the degree of their commitment or passion regarding what they
6 were doing," and I think the proper response to that is that
7 unless and until some Defendant gets up on the witness stand
8 and says, "This was our motivation; this, you know, is why we
9 did this, and this evidence shows it is relevant because it
10 shows or explains why we did something else," or explains this
11 piece of evidence that the Government has put in that until
12 that time is reached, that this evidence is really not
13 relevant or admissible. And in terms of, whether, you can
14 infer that this evidence is relevant because of something that
15 the Government has put into evidence, whether it is a
16 videotape of the Defendants in their praising Hamas or, you
17 know, chanting, you know, support or making statements, angry
18 statements about Israel, I still don't believe that that is
19 sufficient to make all this other information that they seek
20 to introduce relevant.

21 If the crux of their argument or Defense is that "We were
22 just providing charity and, you know, we were not intending to
23 support Hamas, we had nothing to do with Hamas," well, if that
24 is the case and if they are talking about, you know, "We were
25 trying to help Palestinians in," it is the Government's

1 position that whatever caused them to be in that condition is
2 really not relevant, whether it is a natural disaster or
3 whatever else caused, you know, the situation with the
4 Palestinians, this other activity about where Israeli
5 settlements are, you know, that is really a disconnect between
6 how that relates to whatever their motives were.

7 And if their motives are purely altruistic and purely to
8 help these people, then what is the relevance of whatever
9 caused that situation? And so it really seems to contradict
10 their statement that they were an apolitical organization, and
11 that, you know, "We had no interest in supporting Hamas, we
12 are not connected to Hamas, and all we are here to do is help
13 the needy Palestinian people."

14 And again, it depends on whatever it is that the Defense
15 is trying to put in evidence. But situations about what
16 graffiti may be written on a wall somewhere, however many road
17 blocks may exist, there was evidence that there are separate
18 roads for Israelis and Palestinians, and that, you know, it is
19 essentially, we submit, and not very difficult to see that it
20 is basically to present as much evidence as possible to put
21 Israel in a bad light and to attempt to influence the jury to
22 believe that this is about the Palestinian-Israeli conflict.
23 And the more that the Defense can get this jury to consider
24 whatever the government of Israel has done and attempt to make
25 the conclusion that this is a situation where both sides have

1 doing things to each other and, you know, the jury would just
2 throw up their hands and say, "Well, this is a situation that
3 we are just not going to really look at the law, we are just
4 going to abdicate or just say, 'Well, both sides have done it
5 so we are going to find them not guilty,'" and it really does
6 try to focus the jury's attention away from the charges in
7 this case and the evidence as it pertains exactly to those
8 charges, Your Honor.

9 THE COURT: Okay. Thank you.

10 Mr. Cline?

11 MR. CLINE: Your Honor, the bottom line is, as I
12 think Your Honor will see as the evidence develops here, there
13 is no way to air brush out of this case the nature of what was
14 going on over there, both on the Palestinian side and the
15 Israeli side.

16 I think the way to deal with this, I respectfully
17 suggest, is the way Judge Fish did, which is no categorical
18 rulings in the beginning, but rule on particular pieces of
19 evidence as we go along.

20 I think Your Honor will see, and I expect the first
21 witness will be Matthew Levitt. Mr. Levitt will get on the
22 stand and he will present from the Government's perspective a
23 picture of the political situation in Israel, the situation
24 between the Israelis and the Palestinians, and it is a picture
25 that the Government is going to want to foster throughout the

1 trial of essentially the Palestinians as terrorists and the
2 Israelis as the people attempting to present law and order.

3 That is one side of the story. There is another side of
4 the story as well. And it becomes particularly relevant in
5 several ways. One is, of course, the Defendants were, our
6 position is and I think the evidence will show, they were
7 trying to meet real needs of the Palestinian people; that this
8 was a legitimate charity and it was trying to meet legitimate
9 needs. And I think what the evidence will show is those needs
10 were almost entirely created by what Israel is doing.

11 THE COURT: But why is that relevant? If you just
12 show the needs and they are trying to do something to help
13 alleviate those needs, why is the cause of those needs
14 relevant?

15 MR. CLINE: There the is no way to keep it out, Your
16 Honor.

17 THE COURT: Why?

18 MR. CLINE: For example, there is a demolished homes
19 project. Those homes were demolished by the Israelis. You
20 can't -- We just can't pretend, we can't have this case
21 pretending that that wasn't what happened. We have a lot of
22 care for people who are orphans. They are orphans in some
23 instances because their breadwinners are detained or killed by
24 the Israelis. You have a whole range of needs that are
25 created by the restrictions the Israelis are placing.

1 Now, you can debate whether the restrictions are proper
2 or not, and Doctor Levitt will talk about some of that, but I
3 just don't think you can have a coherent trial where you take
4 out of it that part of the context of what is happening.

5 A second way it comes in, Your Honor, they are going to
6 play tapes, whether or not the Defendants testify in this
7 case, there will be lots of their voice in this case. It is
8 going to come in on tape. And what the jury is going to hear
9 in a lot of instances is that they are angry. And, of course,
10 the Government's view is they are angry because they are
11 essentially terrorists or supporting terrorists.

12 Our position is they are not angry because of that. They
13 are angry because of real injustices that are going on over
14 there. And it doesn't mean you have to show every detail of
15 every injustice, but without some context the jury is going to
16 get a completely misleading picture of why, when my client Mr.
17 Elashi is on a tape talking to Mr. Abu Baker in one of the
18 tapes, he is very angry. He is shouting about the injustice
19 of what is going on over there. You just can't air brush that
20 out of this case. It is just part of the fiber of the case.

21 You can certainly limit it around the edge, just like we
22 are going to ask you to limit some of the, we think, unfairly
23 prejudicial evidence that they have around the edges. But the
24 basic story of this conflict is going to be front and center
25 in this case.

1 The third way it comes in is the bias of the witnesses.
2 Again, the Government will present these two anonymous Israeli
3 witnesses. One is Avi and one is Major Lior; Avi as an expert
4 on Hamas. And of course the Government, and I am not this
5 isn't criticism, they are going to want to present these
6 people as objective, as truthful, and we are going to want to
7 attack their credibility. You can't understand -- the jury
8 won't understand, particularly jurors, as we know, don't know
9 a lot about what is going on over there, you can't understand
10 the potential bias of an Avi or a Major Lior without some
11 understanding of what is going on over there--that there is an
12 armed conflict, and in that armed conflict bad things are
13 happening on both sides.

14 Certainly the Palestinians have done some bad things to
15 the Israelis, and the Israelis have done some very bad things
16 to the Palestinians, and these guys, these witnesses don't get
17 on the stand as neutral, objective, detached observers who are
18 here just to tell it like it is. They are participants in
19 what is really a war. And to understand their credibility,
20 particularly where we don't know much about them and can't use
21 some of the other avenues of attacking their credibility, you
22 just have to understand where they are coming from.

23 So for all those reasons -- Again, the Government will
24 object to particular pieces of evidence, just like it did in
25 the last trial. Some I expect you will let in some you will

1 keep out, just like Judge Fish did. But if you make a
2 categorical ruling at this point, it is going to be unworkable
3 because you, we collectively, the jury is not going to be able
4 to understand the context here in all those respects without
5 some evidence of the reality what is really happening over
6 there.

7 THE COURT: Okay. Thank you.

8 Mr. Jacks, any further --

9 MR. JACKS: Yes, Your Honor. With regard to his
10 statement that the first witness is going to talk about --
11 that Doctor Levitt it is going to talk about this situation,
12 he is going to talk about Hamas, not about Palestinians in
13 general. And admittedly there will be some discussion to
14 identify, you know, where the countries are and the boundaries
15 and that type of thing and what the dispute is, but it will be
16 very general.

17 And in terms of him getting up and simply giving the
18 Israeli side of the entire conflict, that is a
19 mischaracterization of what his testimony is about. The guts
20 of his testimony is going to be the background and history of
21 Hamas and how they operate, how they were founded, what their
22 goals are, and how they attempt to carry out those goals, and
23 not the Palestinian people in general. He is going to be
24 talking about Hamas as an organization.

25 With regard to the tapes of the Defendants and this

1 information is necessary to explain their anger, well, that is
2 part of the choice that a Defendant has about deciding whether
3 to testify or not testify. They are not foreclosed from
4 getting on the stand and explaining these things. But the
5 fact that they don't want to testify or don't -- prefer not to
6 testify, doesn't mean that because of that other evidence that
7 would otherwise be irrelevant or inadmissible all of a sudden
8 the Court has to kind of move the boundaries and let that be
9 admissible.

10 And again, in terms of this evidence is important to show
11 the bias of witnesses, well, it is not something that was used
12 to cross examine them in the first trial, and I don't think
13 there is going to be any shortage on the part of the Defense
14 to put this army major and this ISA lawyer, as the cases say,
15 there is not going to be any shortage of the Defendants'
16 ability to show who they are and to put them in their place so
17 that the jury knows exactly who they are, where they work,
18 where they come from, and the organizations that they are
19 affiliated with. I don't think that is going to be a problem.
20 And they are going to make sure that the jury knows through
21 cross examination exactly what biases these witnesses
22 potentially have.

23 And so I think to -- And I don't really take exception to
24 Mr. Cline's statement, "Well, it is something that you have
25 got to look at kind of as they come up in the case," but I

1 certainly would like at a minimum some advanced notice that
2 the parties can at least know in advance outside of the
3 presence of the jury "We are about to put this into evidence.
4 Let's let the Court decide this particular issue." I don't
5 have any problem with that. And if we can talk about whatever
6 it is that is the specific topic that they think is relevant,
7 whether it is Israeli settlements, road blocks, separate roads
8 for Israelis --

9 THE COURT: Well, he gave specifics. I don't know
10 whether you are wanting to get into road blocks or settlements
11 or separate roads, but he gave specific examples of the
12 demolished homes and you can't separate out how those got
13 demolished.

14 MR. JACKS: And that may be one we agree to that
15 that is something that does explain the context of that. But
16 again, I think, you know, you kind of got to take them in
17 increments or in, you know, separate --

18 THE COURT: He gave another example of the orphans
19 and some people are orphans because they have been killed by
20 Israelis or detained.

21 MR. CLINE: This is just the point. There are going
22 to be -- I think Mr. Jacks agrees that aspects of the Israeli
23 conduct that even he is not going to object to. There are
24 going to be other aspects he is going to object to. There is
25 no other way to deal with this than in context as the trial

1 goes along.

2 And all I can tell you, Your Honor, I think, as Judge
3 Fish I think concluded last time, as you hear the evidence you
4 will have a sense of where the boundaries are and you will
5 teach us where the boundaries are. But I think, you know, for
6 a variety of reasons a lot of this stuff is relevant.

7 Let me just take an example. Doctor Levitt is going to
8 testify how Hamas started. And that is important. We aren't
9 going to object to that testimony. But it started out of the
10 first Intifada. Well, what was the first Intifada? The first
11 Intifada was an uprising by the Palestinian people against the
12 Israeli occupation where think threw rocks and a lot of things
13 wept on, and out of that grew Hamas, among other things. How
14 do you air brush all that out of that story of how Hamas
15 started?

16 The story is clearly relevant to this case--how did Hamas
17 begin. But you can't tell a story and sort of air brush out
18 of the picture what was going on at the time.

19 All I can tell you, Your Honor, I can go on and on about
20 all the different ways this is going to be relevant. Please
21 reserve judgment on this and take the evidence one piece at a
22 time, and I think it will make a lot more sense.

23 MR. JACKS: And Your Honor, I don't disagree that
24 much with Mr. Cline, but my concern is that there would be
25 some kind of warning that, you know, we are going to try to

1 put into evidence this thing about settlements. You know, as
2 I said, in the first trial the very first opening argument
3 Ms. Hollander has a map and she is standing there and it has
4 got all these triangles or dots on it or something that show
5 Israeli settlements. Clearly at that stage there wasn't
6 anything to show the relevance of that.

7 And I understand that, you know, you want to talk about
8 your case in your opening statement, but I would just ask that
9 we have some kind of ordered presentation and that when these
10 topics are about to be approached that we can consider them
11 outside the presence of the jury. In the first trial
12 basically that broke down, and it was just -- that is why all
13 this stuff came in about all these things, and the Government
14 essentially just gave up, you know. I don't think ever it was
15 ever really clarified about the relevance of settlements, the
16 relevance of, you know, why there are separate roads.

17 THE COURT: What might be helpful, you know, is you
18 didn't put that in your motion in terms of -- maybe you did.
19 I have read so much and I don't remember specifically what you
20 had in there. But the specific -- If you have some specific
21 items that you are objecting to, you stated you are not
22 objecting to some, if you have some specific items that you
23 are objecting to, that might make it easier to put that in
24 paper so they can look at it and I can look at it, and then I
25 can give you a ruling rather than -- Because it looks like, as

1 you have stated, a categorical ruling now isn't going to work.
2 You acknowledged some of it is going to come in. It looks
3 like you are objecting to some particular items, perhaps. I
4 don't know that I know those. I don't know whether you have
5 identified those specifically in your motion, and so I can't
6 give you a ruling on that without knowing that. They need to
7 know it so they can respond to those specifically, and I can
8 give you a ruling.

9 MR. JACKS: We can do that, Your Honor.

10 THE COURT: Okay. When could you get that in?
11 Obviously I can try to look at some of this tomorrow if we can
12 get it in.

13 MR. JACKS: By tomorrow. It is probably just going
14 to be a listing, maybe some --

15 THE COURT: Well, they are going to want to respond.

16 MR. JACKS: I understand.

17 THE COURT: And I would probably need to listen to a
18 response. Okay.

19 Any thoughts on that, Mr. Cline?

20 MR. CLINE: No, Your Honor. I think, you know, to
21 take the settlement example, it is one of the things that is
22 tied intimately to the whole question of need. Again, they
23 objected to it at the last trial. Judge Fish allowed it in I
24 just think it is part of the story that you are not going to
25 be able to separate it out.

1 But in any event, if they have a list of things, we can
2 argue them specifically to Your Honor and explain to you why
3 they are important to the case.

4 THE COURT: I think that may be more beneficial,
5 because it doesn't look I will be able to make a categorical
6 ruling.

7 Your next motion, Mr. Jacks?

8 MR. JACKS: Judge, it has to do with cumulative
9 experts, and before the first trial I think the response from
10 the Defense was, "We are not going to call all of them."

11 THE COURT: I think that is what they are saying
12 again.

13 MR. JACKS: We understand that. I think there is a
14 couple of them that specifically we have issue with. There is
15 a woman named Leah Tsemel. She is an attorney in Israel, and
16 she is put down on their list as a fact witness and also an
17 expert. And as near as we can tell, one of the principle
18 focuses of her testimony is that Israeli authorities torture
19 Palestinian prisoners. And we object to that unless and until
20 it is shown that that is somehow relevant, and that is, you
21 know -- I don't believe --

22 MR. CLINE: I don't mean to cut you off. Just to
23 speed this up a little bit, we don't know whether we are going
24 to call her. We didn't call her last time. We may not this
25 time. May I just suggest that we provide plenty of notice and

1 we can take this up then.

2 THE COURT: I think that is a good way to do it. I
3 understand from your response you hadn't called her.

4 MR. CLINE: And the same goes for these other
5 cumulative witnesses. We are not going to call duplicate
6 witnesses to testify to the same thing. And if we did, you
7 would stop us.

8 THE COURT: Sure.

9 MR. CLINE: And he would object. So may I suggest
10 that we --

11 THE COURT: I think that is a good way to handle
12 those.

13 Any other motions from your side that we need to
14 consider?

15 MS. SHAPIRO: Just one moment, Your Honor.

16 THE COURT: Sure.

17 MR. JACKS: Judge, this is not really a motion in
18 limine, but in our trial brief we briefed the issue of Rule
19 106, the rule of completeness. I don't know if you have had a
20 chance to read that trial brief we filed a week or so ago.

21 THE COURT: I have not seen that one.

22 MR. JACKS: Then we will -- I guess we could either
23 wait --

24 THE COURT: We will take that up one day next week,
25 it looks like.

1 MR. CLINE: And we may want to file a response, not
2 to the whole thing but just to that part of it.

3 May I ask Mr. Jacks, is there any other part of that that
4 you are specifically going to direct the Judge's attention to
5 before trial?

6 MR. JACKS: That I am going to direct the Judge's
7 attention to?

8 MR. CLINE: Before trial, any other part of the
9 trial brief so we can brief it?

10 MS. SHAPIRO: There are portions in the trial brief
11 that also talk about admissibility of certain items that are
12 specific sections in the trial brief. Essentially the trial
13 brief, Your Honor, adopts the two prior trial briefs that the
14 Government filed, but it also added sections for specific
15 issues that were issues in the last trial that we wanted to
16 bring the Court's attention to as an evidentiary matter ahead
17 of time. So those may be the sections that you may want to
18 look at and that I think we should address prior to when these
19 things come up.

20 MR. CLINE: May I suggest by the end of the weekend
21 or first thing Monday morning we will file a brief directed
22 just to the evidentiary portions of the Government's trial
23 brief?

24 THE COURT: All right.

25 MR. JACKS: And if it may be that if they are still

1 unresolved, that sometime during the trial at the end of the
2 day before it comes up, I mean before that issue is ripe, we
3 can discuss it at that time.

4 THE COURT: Okay. All right. And remind me before
5 we leave today after we finish the motions to discuss Monday,
6 how we want to proceed, the time those issues that we can take
7 up.

8 All right. Any other motions from the Government?

9 MR. JACKS: I don't believe so, Your Honor.

10 THE COURT: All right. Let's go back to the
11 Defense, then.

12 And Mr. Cline, are you going to address your motions?

13 MR. CLINE: Well, most of them, at least. One of
14 the motions, it is actually a Government motion that we
15 oppose, but I guess it is in the nature of a motion in limine,
16 has to do with the documents that were seized by the
17 Government of Israel from the zakat committees.

18 THE COURT: Yes.

19 MR. CLINE: Again, I don't want to just repeat my
20 brief, Your Honor, but in essence we have a couple of
21 different objections. One has to do with the foundation for
22 the admissibility of the documents. They came in last time,
23 and I assume they will next time, through Major Lior. Major
24 Lior was the commander of the Israeli force, I guess you could
25 say, that beginning in April 2002 and continuing through

1 sometime in 2004 went into these zakat committees in the West
2 Bank and took out documents.

3 Major Lior, as it turned out in his testimony at the last
4 trial, didn't participate in any of these actual seizures. He
5 was the commander, and I think what would happen is his troops
6 would go in take the documents and come back and report to him
7 what they had done. So when he testified he wasn't testifying
8 based on personal knowledge to a considerable extent. He
9 certainly had personal knowledge that he possessed the
10 documents and that they were delivered to him by his troops,
11 those kinds of things. What he didn't have personal knowledge
12 of is that -- is where the documents were seized from. For
13 that he was depending on what his troops had told him. That
14 is hearsay. He lacks personal knowledge and he is in effect
15 repeating what his soldiers had told him.

16 We objected at the last trial. We didn't really
17 understand the nature of this evidence until we were in the
18 middle of trial, so we just objected in the course of the
19 testimony, and Judge Fish overruled the objection and it was
20 never explored in any detail. But we have raised that as an
21 issue.

22 Apart from that problem, the hearsay, lack of personal
23 knowledge nature of the foundation testimony for those
24 documents, we have objected under Rules 401 and 403. And
25 there are really I guess two main prongs to the objection.

1 One is these documents were seized after Holy Land
2 closed. Holy Land was closed down in December of 2001. The
3 first of these documents was seized in April of 2002, so five
4 months or so later. And they continued to be seized over time
5 until sometime I think in 2004, so several years after Holy
6 Land had closed.

7 Now, the only possible relevance of these documents is to
8 attempt to show that these zakat committees were in fact
9 affiliated with Hamas, but their affiliation with Hamas, if
10 they have any affiliation with Hamas, is only relevant during
11 the time that Holy Land was providing with money. If they are
12 affiliated with Holy Land today, who cares. It is not part of
13 this case. So the timing of the documents is one of the
14 issues.

15 Another one of the relevance issues has to do with the
16 lack of any information about where they were found. We have
17 the hearsay information that they were found in particular
18 zakat committees, but nobody knows -- at least Major Lior
19 didn't know where within the zakat committees they were found.

20 THE COURT: Specific locations?

21 MR. CLINE: Specific locations. They could have
22 been in the trash basket. They could have been in a janitor's
23 locker. They could have been in the director's desk. They
24 could have been on the walls. They could have been in a file
25 cabinet. You just don't know. So it is very hard to assess

1 what significance they have intending to show some affiliation
2 with Hamas.

3 We also don't know, relatedly, what other documents were
4 there, because what happened with these documents, the Israeli
5 Defense Force went into the zakat committees, apparently
6 seized them all, and put them in a warehouse which is located
7 somewhere in the West Bank. We have never had access to those
8 documents. That was a subject to the letter rogatory motion.

9 Now, some of the Government witnesses, Mr. Levitt, for
10 example, I believe have had access to the whole cache of
11 documents. I assume that Avi, the Government expert, has had
12 access to the whole set of documents. Major Lior may have had
13 access to them. But we haven't. And so what we are unable to
14 do is put them in context.

15 The Government, of course, has picked out the ones that
16 are most probative of their case, as I would expect them to
17 do. We haven't had the chance to do the same thing. So it
18 is, again, for that reason, very hard to assess what probative
19 value they have.

20 Let me give you a concrete example. Some of the
21 documents are pictures of Sheikh Yassin who was the founder of
22 Hamas. Let's assume, based on the hearsay from Major Lior,
23 that they were found in the zakat committee somewhere. Well,
24 where were they found? That is one question. But what else
25 was found with them? If you have a picture of Sheikh Yassin

1 in a file cabinet somewhere and you have got Yasser Arafat,
2 the head of Fatah, the rival faction, up on the wall in a
3 frame, it is very hard to conclude that Hamas is running that
4 organization. Hamas didn't like Arafat. Arafat was their
5 rival. And if Arafat is the guy on the wall and Yassin is
6 stored away in a file cabinet somewhere, that is pretty
7 probative. But we are not in a position to address any of
8 that because we have never had access to the whole pool of
9 documents.

10 So those, I believe, go strongly to the relevance of this
11 information.

12 On the unfair prejudice side, getting in now to 403, we
13 have pictures -- and I am going somewhat from recollection.
14 For one thing there are some pictures, for example, of Osama
15 bin Laden; a couple of pictures I believe of Osama bin Laden.
16 We all -- We picked the jury in the last few days on the
17 assumption that this case had nothing to do with Al Qaeda
18 Osama bin Laden, 9/11, and now we are talking about through
19 those documents starting to inject them into this case, which
20 I think would be a terrible problem that would affect the
21 fairness of it.

22 But there are also pictures of suicide bombers, you know,
23 stylized portraits of suicide bombers, that kind of thing,
24 which are highly prejudicial, and I think under the
25 circumstances where we don't know where these documents came

1 from, what prominence they have --

2 THE COURT: Are they supposedly members of Hamas?

3 MR. CLINE: Yes. Some; not all actually. Some are;
4 some aren't. But there are a number of pictures that the
5 Government will put into evidence. You will see them. They
6 are kind of stylized portraits of suicide bombers before they
7 go off on their missions.

8 So that is, again, we think, unfairly prejudicial
9 evidence, particularly given the very slim, if any, probative
10 value that they have. So those are our basic arguments on
11 those documents.

12 THE COURT: Okay.

13 Ms. Shapiro?

14 MS. SHAPIRO: Yes. I will address Mr. Cline's
15 points in turn.

16 We did have a couple of rounds, at least two and perhaps
17 even three, of briefing on this very issue, and I think they
18 have been cited in the papers with the ECF numbers, and it
19 basically summarizes all of these arguments, both the
20 arguments Mr. Cline has made and our rebuttal to them.

21 As for Major Lior's testimony, the bar for authenticity,
22 which he was purely an authenticity witness, is very low. He
23 needs to show that they are more likely than not to be what
24 they purport to be, these documents. He didn't testify based
25 on hearsay. He testified based on a chain of custody that he

1 presented. He talked about how the orders that he gave the
2 soldiers, how they seized the documents, what they did with
3 them, where they went each step of the way, and that those
4 documents ended up after that chain of custody in his custody,
5 and they were indexed. And so Judge Fish had no trouble
6 whatsoever finding those to be authentic, and that was the
7 sole purpose of his testimony.

8 He didn't address the documents other than these were the
9 documents that were seized, this is the chain of custody, and
10 these are where the documents came from.

11 With respect to where they were and the fact he doesn't
12 know whether they were on the wall or in a desk, that goes to
13 the weight, not to the authenticity. That is material for
14 cross examination, and in fact that was the crux of their
15 cross examination. I remember Mr. Dratel cross examining
16 about, you know, "Weren't they found -- They could have been
17 found in a wastebasket. They could have been found in a
18 closet." So that is exactly the kind of cross examination
19 that they are entitled to probe. That goes to the weight of
20 the evidence but it doesn't go to the authenticity. And that
21 is what Major Lior establishes.

22 With respect to the dates and the fact that they were
23 seized after 2001, that is extremely relevant because the
24 committees continued to be controlled by the same people who
25 the Government alleges are Hamas people, and it goes to show

1 that if this committee in 2002 when controlled by the these
2 Hamas individuals are Hamas, then in 2001 they are very likely
3 to be Hamas. And we are entitled to make that argument, and
4 it is probative if in 2002 they are Hamas, it is probative of
5 whether in 2001 when they are controlled by the same personnel
6 they are also Hamas.

7 And again, the fact that they don't know or there isn't
8 specific soldiers testifying about where materials came from
9 in committees, that is cross examination.

10 And 403, it is not -- this evidence is not at all
11 prejudicial. These are -- the pictures that were presented
12 were, for the most part, the vast majority, in fact I think
13 all, were Hamas martyrs who they were either framed -- for
14 example, we had framed pictures of who they call the engineer,
15 who was a famous bomb maker Yehia Ayyash. There is a framed
16 poster -- in fact there is a string across the back, so
17 unlikely it was in a drawer. But nevertheless, there were
18 pictures that we presented that are actually still in the
19 frames.

20 And there were all kinds of other posters of various
21 martyrs who conducted suicide bombings on behalf of Hamas.
22 The posters have the Hamas symbol. There is no mystery about
23 who they are.

24 And there were also some computer files, and those had a
25 variety of posters and pictures. And some of them did have

1 Osama bin Laden. I don't believe we introduced any that were
2 solely Osama bin Laden. There were some that had terrorist
3 leaders around the world. So there was the leader of
4 Chechnya, and there was Osama bin Laden, and there was
5 Nasrallah from Hezbollah, and there was Sheikh Yassin from
6 Hamas. So we have sort of all stars of terrorists, and these
7 were in the committee.

8 So it is not overly prejudicial because it is our burden
9 to establish the tie between these committees and Hamas, and
10 given that those committees are on the other side of the
11 world, that is a difficult task, so anything that is probative
12 and relevant -- it is surely more relevant and not
13 prejudicial. And the Judge let it in without any trouble.

14 And Mr. Jonas just reminds me, obviously their argument
15 and the crux of their case is that these committees have no
16 association with Hamas; they are just innocent, benevolent
17 charities that dispense aid to the Palestinians without regard
18 to politics. So to find these sorts of materials in these
19 committees obviously is very probative that in fact they are
20 not neutral, in fact they are not benevolent, that these are
21 committees that are associated with a political point of view,
22 and that point of view, the Government will say, is Hamas
23 based on the leadership of the committees and a variety of
24 other factors that our experts will discuss.

25 THE COURT: Did you have something else?

1 MS. SHAPIRO: Not at this time. Thanks.

2 THE COURT: Mr. Cline?

3 MR. CLINE: Just a couple of quick points.

4 On this chain of custody issue, there is no chain of
5 custody exception to the hearsay rule. And the point is, what
6 is important about these documents is where they were found,
7 and Major Lior only knows where they were found because of
8 what someone else told him. He has no personal knowledge of
9 that. He knows it because his soldiers told him that, and
10 that is hearsay. It is a statement, an out-of-court statement
11 offered to prove the truth of the matter asserted not within
12 any exception, and he lacks personal knowledge of it. So
13 there just is no chain of custody exception to the hearsay
14 rule, and that is basically the argument I understand the
15 Government to be making.

16 On the 401 and 403 issue, I don't think there is any
17 justification for letting in the Osama bin Laden stuff. If he
18 was in a poster with a bunch of other people, they have got
19 plenty of other posters. We think they should be all excluded
20 for the reasons we have outlined, but there is certainly no
21 reason to let in some in with Osama bin Laden.

22 And Ms. Shapiro said where they were found and these
23 other issues go to their weight, and I guess in a sense that
24 is true, but under 403 what you are doing, of course, is
25 weighing the weight, that is the probative value, versus the

1 unfair prejudicial impact. And the weight is pretty slight
2 here for the reasons that I outlined before, and the
3 prejudicial impact is quite high. So again under 403 we would
4 ask the Court to keep them out.

5 THE COURT: Thank you. And that is the subject of
6 some motions. We have a draft order that hasn't been put out
7 yet, but we will get that out in the next -- probably by
8 tomorrow or so.

9 All right. Next motion?

10 MR. CLINE: The next motion, Your Honor, is the
11 motion on the designation of Holy Land. This happened in the
12 last trial in the following way.

13 First of all, a little background. The events in this
14 case, at least the charged transactions in this case begin I
15 think sometime in 1995, and the last one is in mid to late
16 2001. So those are the financial transactions that we are
17 talking about, the transfers of money to the zakat committees
18 and the other entities in the West Bank.

19 In December 2001, I think December the 4th, the
20 Government designated Holy Land a specially designated
21 terrorist under the IEEPA, the International Economic Powers
22 Act. There is another Emergency Economic Powers Act.

23 THE COURT: Yeah.

24 MR. CLINE: And closed it down. It all happened in
25 one day. It was designated I think December 3rd, maybe late

1 at night, and early the next day they came in, seized all the
2 assets, and closed it down. There were, of course, no further
3 transactions after that.

4 The designation and blocking memorandum is dated December
5 3rd or 4th, 2001, and that is the document that the Government
6 wants to put into evidence. It came in in the last trial. It
7 was the very last thing the Government did in its case, the
8 very last exhibit it offered. Just before it rested it puts
9 in this document. We objected on hearsay grounds. We did not
10 know it was coming in at that point. We again had a brief
11 argument in Court, no briefing, Judge Fish overruled the
12 objections and the document came in.

13 We have now briefed it, and I think it is clear that
14 there is no hearsay exception that permits this document to
15 come in. It is offered to prove the truth of the matters
16 asserted in it. There is no non-hearsay purpose, as there
17 might be, for example -- just hypothetically if this blocking
18 notice had been issued, say, in 1999, you could argue that it
19 has a non-hearsay purpose unrelated to its truth to put the
20 Defendants on notice that what they are doing is wrong. Then
21 it might come in for a non-hearsay purpose. But this document
22 was issued, the blocking notice was issued after all the
23 transactions at issue in this case. So its only possible
24 relevance can be for the truth of the matters asserted in the
25 document. Again so it is hearsay.

1 What is the exception to the hearsay rule that might
2 apply? Well, the only one under Fifth Circuit law, business
3 records exception does not apply to government public records.
4 That is *U.S. versus Keane* I think is the name of the case.
5 And so we are talking about the public records exception
6 803(8). 803(8)(C) is the one most nearly applicable. That
7 has to do with fact finding by a government agency. But that
8 doesn't come in against criminal defendants. There is a
9 specific exclusion in 803(8)(C) that those items -- fact
10 finding memoranda by government agencies cannot come in
11 against criminal defendants, so that can't work here.

12 The to Government has fallen back on 803(8)(B), but the
13 cases it cites are cases where the court permitted the
14 admission into evidence of truly routine, almost mechanical
15 observations, like license plate numbers at Customs
16 checkpoints. I mean, things where there is no discretion
17 involved, there is no fact-finding involved, you just got
18 somebody, law enforcement or otherwise, sitting there writing
19 down the numbers all day, and there is really no reason to
20 doubt the trustworthiness of the document.

21 This blocking memorandum is anything but that. It was a
22 highly politicized event. There were 3,000 some odd pages of
23 administrative record. There were all kinds of reasons to
24 challenge the accuracy of the Government's determinations.
25 That is why we are here, in fact. It is a classic 803(8)(C)

1 type document rather than a routine observation that might
2 fall under 803(8)(B). And 803(8)C simply doesn't permit
3 admission of government findings against criminal defendants.
4 So there is a big hearsay problem and we think it ought to be
5 kept out on that ground.

6 There is also a Rule 403 problem. And interestingly I
7 think it came up in voir dire yesterday, or maybe the day
8 before. The problem with a document like this is that it
9 suggests to the jury that someone else with great expertise
10 has already made the determination that the jury is being
11 asked to make--namely, that the Holy Land Foundation, and by
12 extension its officers and agents who are on trial here, were
13 engaged in financing a terrorist entity; they have been
14 blocked for just that reason under the very executive orders
15 that the jury is going to be considering. And that has an
16 enormously prejudicial impact.

17 One of the jurors yesterday was talking about that Dallas
18 Morning News article that he read, and one of the things he
19 read that stuck in his mind was that the President had already
20 determined that the Holy Land Foundation was doing bad things
21 and needed to be shut down. And he said, you know, and I am
22 paraphrasing now, but in essence, "Who am I to second-guess
23 the President." He is referring to this particular exhibit,
24 this very document that we are now trying to keep out of
25 evidence. That is what he is talking about. And it will have

1 that impact on the jury if it is allowed in evidence. It in
2 fact says that an expert agency, the Department of Treasury,
3 has already made the determination, one of the key
4 determinations that the jury is being asked to make. That is
5 terribly prejudicial, and it really has very little probative
6 value given the process by which this determination was
7 reached.

8 So both hearsay and 401, 403 grounds we ask the Court to
9 keep it out. And I should add, the confrontation clause as
10 well. That is certainly part of our argument, although that
11 tends to get subsumed in the hearsay discussion.

12 THE COURT: Okay. Thank you.

13 MR. JONAS: Your Honor, I guess I will take this
14 one.

15 I am going to be very brief, and I just want to give Your
16 Honor a little bit of history on that.

17 There is a reason why that was the last document that we
18 offered into evidence at the end of our presentation. It
19 wasn't because we were trying to set a trap or anything like
20 that. We struggled with whether or not we should admit that
21 document. And we acknowledge that there could be a 403 issue.

22 Through cross examination of some of our witnesses, the
23 Defense admitted exhibits, several exhibits which acknowledge
24 that Holy Land was shut down. And there was one in
25 particular, and I apologize, Your Honor, I don't recall the

1 Defense exhibit number, but it discussed the Holy Land being
2 closed. And I can't remember if it said by the government or
3 just said closed. And we felt at that point that the door was
4 sufficiently opened that an explanation needed to be presented
5 to the jury as to why Holy Land Foundation was closed and to
6 what happened, and that is why we presented that document.

7 And in this upcoming trial, I think our intention at
8 least initially is not to offer it into evidence.

9 THE COURT: It is still not to offer it.

10 MR. JONAS: Yes. But we a want to reserve to see
11 how things progress.

12 THE COURT: I think if that is going to be your
13 procedure, then we will just wait until the time you are ready
14 to offer it. And just be sure you give them notice, and then
15 we will take that up outside the presence of the jury. I will
16 have my context by then, so we will do it that way.

17 MR. CLINE: And, Your Honor, I am fine with that.
18 But I do want to make a couple of points.

19 THE COURT: Let's wait until they are going to offer
20 it. If they don't offer it, then none of this will matter.
21 So we will hear it then if it becomes necessary.

22 Next one?

23 MR. CLINE: I don't know that there are any others.
24 The Government has filed -- We filed a motion to exclude a
25 couple of bits of Government expert evidence, but it is also

1 part of a *Daubert* hearing, and I wonder if it wouldn't make
2 more sense when we have the witnesses and we can talk about
3 the *Daubert*. And there is a 403 component to the motions, but
4 I think it makes more sense to take it up.

5 Your Honor, we do have something else that Ms. Hollander
6 can argue.

7 THE COURT: Okay. Mr. Jonas, were you going to say
8 something?

9 MR. JONAS: Your Honor, I was just going to inquire
10 about the *Daubert* hearings. Some of our witnesses, in
11 particular Bruce Hoffman, one of our experts, we have small
12 windows that we can call these people.

13 THE COURT: I think we had discussed taking up those
14 motions at the time the experts are here so they wouldn't have
15 to come in. And I was going to try to rule on them, to the
16 extent that I could, from the briefing. Is there briefing
17 completed on that one?

18 MR. JONAS: I believe so.

19 THE COURT: We will take a look at those in the next
20 day or so. If we can rule on them from the briefing, I will
21 let you know that Monday.

22 MR. JONAS: That would be great, Your Honor.

23 THE COURT: And those that we need a hearing, we
24 will take those up as the experts are here.

25 MR. JONAS: And if I can sort of segue to another

1 issue just to inform Your Honor. As I said, some of our
2 witnesses, two or three of them we have narrow windows that we
3 can call these people because they are very busy, they do a
4 lot of traveling, they teach at colleges and that sort of
5 thing. In the last trial we faced a similar issue, and the
6 Defense was gracious enough to allow us to interrupt the
7 testimony of a witness on the stand, put on the witness who
8 had the conflict, and when they are off to resume with the
9 witness that was previously on.

10 I am not saying we are necessarily going to have to do
11 that in this case. We are trying to set forth our order of
12 proof so we can work with the witnesses, but sometimes things
13 move faster than expected or slower than expected.

14 THE COURT: Hopefully faster.

15 MR. JONAS: Yes. We all want that. But there may
16 be situations where we may have to request a favor to allow us
17 to interrupt the testimony of a witness to get on another
18 witness through a scheduling conflict.

19 THE COURT: I am sure -- You worked that out last
20 time. I am sure we can do that again this time.

21 MR. CLINE: We will. And we may have some similar
22 issues, and we will work them out as well.

23 THE COURT: Ms. Hollander?

24 MS. HOLLANDER: Your Honor, we have -- and I don't
25 know how you want to proceed, because it is a very -- they are

1 very long motions, and maybe you have already dealt with them,
2 but --

3 THE COURT: I have read them. Do you want to give
4 me the title of which one --

5 MS. HOLLANDER: Well, we -- If you look at the
6 Defendants' joint motion in limine to exclude evidence from
7 trial that we just filed August 29th of this year, it listed
8 all of the previous ones, so we didn't have to brief them all
9 again.

10 THE COURT: And I can tell you I am denying the
11 request for a *James* hearing. We are not going to have a
12 separate hearing in advance of the trial to determine
13 co-conspirators. So that is denied.

14 And then your joint motion regarding the Religious
15 Freedom of Restoration Act, First Amendment, I have read those
16 your motion. The response is in Judge Fish's prior order, and
17 I am adopting his order. I think that is correct. I am
18 denying that one. That will be the same ruling.

19 MS. HOLLANDER: Those are the kind of two smaller
20 ones.

21 THE COURT: Your fifth one was a joint motion to
22 strike alleged co-conspirator statements and associated
23 testimony. How is that one different than your first one on
24 *James*? And I read it, but there is so many that you filed, I
25 have forgotten now what the distinction was.

1 MS. HOLLANDER: That is a good question. I think it
2 was -- I think you are right. I think that one was specific
3 to what we refer to as the Elbarasse documents which are
4 large -- Am I wrong?

5 MR. CLINE: I think that is right. And that is one
6 of the issues the Government brought up in their trial brief.

7 THE COURT: That you are going to respond to?

8 MS. HOLLANDER: That is right.

9 THE COURT: We will take that one up in connection
10 with that, then.

11 MS. HOLLANDER: To get rid of the kind of smaller
12 ones, No. 4, the Defendants' joint motion --

13 THE COURT: Indictments and convictions?

14 MS. HOLLANDER: Yes. And I should have said this
15 and I apologize. It was denied as moot by Judge Fish because
16 the Government wrote a letter, which I tried to find today but
17 couldn't, but I found the transcript reference where he said
18 the Government responded to this motion by letter stating they
19 do not currently intend to introduce any such evidence, and
20 therefore he denied it as moot, and if the Government's
21 position changes it would change. So I don't think we need to
22 raise that at this point.

23 MR. JONAS: No, but if I can address that briefly.
24 What the Government had intended on doing was introducing
25 convictions of individuals for being members of Hamas and

1 these are convictions in Israel. The Defendants filed their
2 motion and we decided that they have a valid point and we will
3 not introduce those convictions as evidence.

4 However, some of our experts relied upon their
5 convictions as their body of material that they reviewed in
6 forming opinions. One of the experts, and I believe it was
7 primarily Avi, referenced one of these convictions. Mr.
8 Dratel would object and point to the Government's letter, and
9 Judge Fish each time denied his objection.

10 It is our position that his objection is incorrect. We
11 agreed not to introduce the convictions themselves. We never
12 agreed that the expert would not be able to rely upon the
13 convictions in forming an opinion.

14 THE COURT: And so you are intending on eliciting
15 that same testimony from the expert this time around?

16 MR. JONAS: Yes, sir.

17 THE COURT: And you are intending to object?

18 MS. HOLLANDER: Yes, sir.

19 THE COURT: Okay.

20 MS. SHAPIRO: Your Honor, Judge Fish actually ruled
21 on that, and I think it is ECF 717 on July 16th, 2007,
22 memorandum opinion and order.

23 THE COURT: I don't think I have seen that one. All
24 right.

25 MS. HOLLANDER: We may wish to review that and

1 revise that, Your Honor.

2 THE COURT: We can come back to that. All right.
3 That gets us to your big one.

4 MS. HOLLANDER: The big one, that really just leaves
5 the big one, and the big one is the that was filed on 3/14/07,
6 and that one was never ruled on in the previous case. Judge
7 Fish, when we kind of got to this point, he said he would rule
8 on it as things came up. So we don't really have, except for
9 maybe individual rulings as they came along. And some of
10 these it would be very helpful to us --

11 THE COURT: Do you want to point out which ones you
12 would like to get rulings in advance?

13 MS. HOLLANDER: The references to other
14 organizations, No. 2, evidence regarding Hezbollah, Al Qaeda,
15 Palestinian Islamic Jihad, other organizations, that one is
16 really important.

17 THE COURT: Let me hear from the Government. I have
18 read your brief and I think I read your response, but do you
19 want to give a response on that? Why is that relevant? Why
20 would you get into that?

21 MS. SHAPIRO: Well, there is two different contexts.
22 One is that to the extent that the Defense is trying to
23 portray both the Holy Land Foundation and the organizations to
24 which they gave money to overseas as neutral apolitical
25 organizations, they go to show that in fact they are -- that

1 they have either these political jihadist type information
2 about terrorist organizations, and we also have --

3 THE COURT: Who has that?

4 MS. SHAPIRO: In the zakat committees.

5 Also there is material, and I don't know if that is what
6 they are getting at now, there is material from the Holy Land
7 computers that has all kinds of material from Hamas, of bin
8 Laden, of all kinds of generically jihadist material that Holy
9 Land itself possessed, and so those are probative. That is
10 one time when other organizations come up.

11 The other time is that we have an expert witness who will
12 be testifying about why -- about how terrorist organizations
13 use a social network to essentially buy public support and buy
14 popular support, and how that enables them to exist as a
15 terrorist organization; how sort of social sides of terrorist
16 organizations aid the terror side. And he is going to give
17 examples not just of Hamas, but to help the jury understand
18 that this is an modus operandi of several different terrorist
19 organizations. And the relevance is --

20 THE COURT: This is Doctor Levitt?

21 MS. SHAPIRO: This is Doctor Hoffman.

22 THE COURT: So through your expert, through some of
23 the items that were seized from the zakat committees, and then
24 through what was seized from the Holy Land Foundation?

25 MS. SHAPIRO: Those are the only times that I think

1 other organizations -- and I don't know if Doctor Levitt may
2 refer to briefly other terrorist organizations, but he is
3 essentially talking about Hamas. But those are the times that
4 other organizations may come up.

5 There is, for example, a videotape that Mr. Jacks is
6 reminding me of where there is children from a kindergarten
7 ceremony who are dressed up in military fatigues and acting
8 out characters, and one child of five or six years old is
9 dressed up like Nasrallah, who is the head of Hezbollah. In
10 that instance there is Hezbollah --

11 THE COURT: Where is this videotape seized?

12 MS. SHAPIRO: It was a videotape on which the
13 experts relied to show that -- it was a graduation ceremony
14 from the Islamic Society in Gaza, which is one of these
15 committees to which Holy Land contributed money. And in the
16 same video there is a child dressed up as Sheikh Yassin from
17 Hamas. So there is, for example, Hezbollah is shown because
18 there is a child dressed up as Hassan Nasrallah, but there is
19 also a child dressed up as Sheikh Yassin.

20 THE COURT: So this is a video seized from one of
21 the zakat committees is what you are saying?

22 MS. SHAPIRO: This is actually a video that showed
23 on Al-Manar, which is the Hezbollah television station in
24 Lebanon. And it was shown as a demonstrative as the kind of
25 material that the experts were relying on in analyzing the

1 nature of these committees.

2 THE COURT: And you are saying that part of video
3 Hezbollah is mentioned and then Hamas.

4 MS. SHAPIRO: Children dressed up -- One child
5 dressed up as the head of Hezbollah, and one child dressed as
6 the head of Hamas. So that might be another instance.

7 There may be -- For example, there is an overseas
8 speakers list that the Holy Land Foundation used where they
9 brought speakers in from overseas to raise money. And some of
10 those overseas speakers are part of a Jordanian movement that
11 is Hamas-like but not exactly Hamas. And so those people are
12 identified as Islamic Action Front.

13 Again, it shows -- it is probative to show that Holy
14 Land, an organization that holds itself out to be a neutral
15 charity, is bringing over terrorists, not just Hamas, plenty
16 of Hamas, but also from Jordanian Action Front.

17 The evidence -- anything that mentions another
18 organization is meant as contextual. It is not out there on
19 its own as going into another organization. We are not having
20 any sort of separate evidence that is focused on some other
21 terrorist organization. It is all in the context of Hamas and
22 these Defendants.

23 THE COURT: Okay.

24 MR. CLINE: Your Honor, I just wanted to address the
25 Hoffman part of this. This was one of the motions that I had,

1 and we can maybe decide this definitively later in connection
2 with this testimony, but I did want to make this point.

3 The Government has two experts, Doctor Levitt, and I
4 think to some extent Avi, who will talk about Hamas and how
5 Hamas has two parts--the military and the social wing. And we
6 certainly have our problems with Doctor Levitt's testimony and
7 Avi's testimony, but we don't dispute that that is relevant to
8 talk about Hamas and its social wing. And I don't think there
9 is going to be any dispute that Hamas in fact has these two
10 aspects or maybe more than two aspects. The dispute is going
11 to be whether the zakat committees were part of any social
12 wing Hamas has. But how Hamas is structured I don't think is
13 going to be a big point of dispute in this case. So they have
14 two experts to cover that point that is essentially
15 undisputed.

16 They want to bring in Doctor Hoffman to sort of guild the
17 lily here by saying not only does Hamas have a social wing, a
18 fact that is essentially undisputed, but all these other
19 terrorist organizations also have social wings. And I just
20 don't see the relevance of that, other than to drag into this
21 case Hezbollah and the Tamil Tigers and Al Qaeda and all these
22 other really bad terrorist groups just so the jury hears them
23 and starts to associate first Hamas, and through Hamas the
24 Defendants, with those other terrorist organizations. It just
25 seems completely unnecessary to me and horribly prejudicial.

1 The only point that that witness Doctor Hoffman is going
2 to support is a point that two witnesses will already
3 establish for the Government and that we are not going to
4 dispute fundamentally. We are certainly going to dispute the
5 point about the zakat committees, but that is not what Hoffman
6 is going to testify about. His point is Hamas has a social
7 wing, and so do lots of other terrorist organizations. We are
8 not disputing that Hamas is a terrorist organization and that
9 it has a social wing. So his testimony is just, it is pure
10 prejudice.

11 THE COURT: As far as it goes beyond Hamas?

12 MR. CLINE: Yes. If he wants to come in and testify
13 about Hamas, then we get into an issue of cumulative. We have
14 three experts. We don't dispute that that is going to be part
15 of the case. But to bring in these other terrorist
16 organizations is just pure prejudice.

17 MR. JONAS: Your Honor, if I can sort of layer the
18 Government's witnesses, Doctor Levitt is going to come in and
19 talk about, as Mr. Jacks said, what we call Hamas 101. He is
20 basically going to educate the jury on Hamas structure,
21 history leaders, that sort of thing. Doctor Levitt will talk
22 about the social wing in general, give a couple of examples so
23 the jury early on knows that there is a social wing and what
24 it does. So to put on a layer, Doctor Levitt is sort of
25 10,000 foot approach.

1 Avi gets into the weeds of the social wing on the ground,
2 gets into a lot of specific details and how certain specific
3 committees of the social wing are controlled by a part of
4 Hamas. He is right there.

5 Doctor Hoffman is 30,000 feet. And the reason we think
6 Doctor Hoffman's testimony is very relevant sort of goes back
7 to what Mr. Jacks argued earlier. There is going to be a lot
8 of evidence of charity in this case. The Defense is going to
9 bombard, and understandably so, the jury, and I am not saying
10 we agree with it, but they are coming at the jury with
11 pictures of children, pictures of giving aid with food to
12 needy families, pictures of demolished homes, and they are
13 going to -- in an attempt to water down the nature of Hamas
14 and its violent activity and terrorist activities.

15 There is an undercurrent of, as Mr. Jacks said, "Hamas
16 isn't so bad. Both sides are bad. There is this charity
17 wing, and the charity wing is good, and in a sense, yeah, we
18 understand the law from the Judge, but we are going to ignore
19 it and find these Defendants not guilty because they are doing
20 good." And there was one potential juror who commented on
21 that. And if the Judge recalls, you rehabilitated him on it,
22 but he had some hesitation.

23 And that is a concern of ours that the jury is going to
24 have the same hesitation when they see all the evidence
25 presented by the Defense.

1 What Doctor Hoffman does is he explains to the jury,
2 "Look, Hamas has a social wing. Yes. They are not the only
3 ones. Other terrorist organizations do, and there are other
4 terrorist organizations that don't." And he is going to
5 explain the difference how these terrorist organizations
6 operate, in general. And he is going to explain how ones that
7 do not have the social wings are not very successful and do
8 not last very long because they, unlike the ones with social
9 wings, do not win the hearts and minds of the population. He
10 is going to explain winning the hearts and minds of the
11 population by the terrorist group is very important for it to
12 succeed in its goals of toppling a government, if that someone
13 of its goals.

14 And, of course, he will pepper his testimony with
15 examples. And these examples are going to include some groups
16 that are Islamist groups, like Hamas, and some groups that are
17 not Islamist groups, like the IRA. And I think it is very
18 important for the jury to understand that Hamas isn't all
19 about charity or is not half about charity; that that charity
20 is a means to an end, and that end is a destruction of the
21 state of Israel.

22 MR. CLINE: And Doctor Levitt will cover everything
23 he just said about Hamas, and you will see how well he covers
24 it.

25 MR. JONAS: Your Honor, I don't think I can add more

1 than that to say that Doctor Hoffman will show that this is
2 not just a Hamas MO; that this is a plan, for lack of a better
3 room, a guide followed by other terrorist organizations
4 successfully.

5 MS. HOLLANDER: Your Honor, let me start by saying
6 we just spent two days telling these jurors -- the Government
7 spent two days telling juror, after juror, after juror, after
8 juror, this case is not going to be about Al Qaeda it is not
9 going to be about Iraq or about any other organizations; it is
10 going to be about Palestine Israel and Hamas. The only
11 purpose of doing this is to prejudice this jury. It has no
12 probative value whatsoever. If Hamas -- they can talk about
13 Hamas all they want. But they can't -- I mean, there is no
14 reason to do it except to pull the jurors back in and have
15 them thinking about Al Qaeda and 9/11 and all of these other
16 organizations. Their discussion with Doctor Hoffman listed
17 the Tamil Tigers and the IRA.

18 But the other thing I wanted to say is that we are not
19 introducing evidence to water down Hamas. We are introducing
20 evidence to show the need in Palestine. And the need existed
21 before Hamas and it existed after Hamas. The need existed and
22 continues to exist. And that gets back to the zakat
23 committees and back to the other problem here with this
24 evidence they want to introduce that they found at the zakat
25 committees, and why we had asked for letters rogatory to try

1 to see the same documents that have seen, because there are
2 tens of thousands of documents.

3 They went in -- It is actually part of the story of what
4 was going on there, why Israel had what was called Operation
5 Defensive Shield, why they went into the West Bank and took
6 all of these documents, had to do with some suicide bombings,
7 and those had to do with something else that Israel had done.
8 And that is what happens over there. One thing happens and
9 another thing happens, and then, I mean, there is tragedy and
10 there is people killed on both sides.

11 But they went into these zakat committees and took
12 everything from them. And Doctor Levitt has seen this
13 information, and Avi has seen it, and Lior has seen it, and we
14 have had no opportunity to see it. So we don't even know what
15 else they have. We don't know what other videotapes were in
16 the zakat committees.

17 And this particular one, this graduation, was taken off
18 the TV in 2007, six years after Holy Land closed, and that is
19 one of the things that they want to introduce.

20 And they want to introduce documents that were found at
21 the Holy Land office, but only the ones that they want to
22 introduce; not anything that shows -- And last time they
23 resisted every time that we actually tried to show what Holy
24 Land did--the need, the demolished homes, the work that Holy
25 Land does--because the Government's position is that they want

1 to keep this jury focused on Hamas and the violence of Hamas
2 at the same time that the Government doesn't -- claims that
3 they don't want to talk about the Palestinian-Israeli
4 conflict.

5 And this evidence of acts of terrorism by Hamas, which is
6 how they are going to start if they do it like they did last
7 time, and evidence of these other organizations have nothing
8 to do with Israel and Palestine, have no probative value, so
9 that the prejudicial --

10 THE COURT: She stated, Ms. Shapiro -- Mr. Dratel,
11 you had something you wanted to say?

12 MR. DRATEL: What is the relevance of how other
13 terrorist organizations do things? It is really about how
14 Hamas does it and whether these zakat committees are part of
15 that. I don't know if the Court has read the transcript.
16 There was not any word from the Defense that Hamas does not
17 have a social wing. There was never an argument of that.
18 There was never an argument that Hamas is not a terrorist
19 organization.

20 The argument is what is the character of the zakat
21 committees in the context of the Defendants' knowledge --
22 Actually there are two elements--Defendants' knowledge but
23 also the actual committees themselves and where they are on
24 the ground in West Bank and Gaza. So the notion of how some
25 other terrorist organization conducts business is not relevant

1 to our discussion here, because we are not saying there is no
2 social networking in terrorism. We are never said that. So
3 it is really not relevant.

4 I don't see why you would need a 30,000 foot picture when
5 you have a picture on the ground, which is what they are
6 saying. It is redundant and it is all about the prejudice of
7 this sort of global nature of terrorism, which we spent three
8 days trying to refine so it is focused on what the allegations
9 are. It almost gets to the point of an amendment and a
10 variance in the sense that we are really talking about now
11 other groups, other issues as opposed to what is charged in
12 the indictment and what other issues in the case that the jury
13 is going to have to decide.

14 THE COURT: Thank you.

15 MS. MORENO: One final thing, Your Honor. Being so
16 intimately involved in the voir dire for the last three days,
17 I want to remind the Court that there were many panelists who
18 said, "As long as this case has nothing to do with 9/11 I can
19 be fair." As soon as the specter of Al Qaeda and Osama bin
20 Laden is raised, that, I feel, constitutes a fraud upon what
21 those jurors were led to believe about what was really going
22 on in this case.

23 THE COURT: As I understood what you were saying,
24 Ms. Shapiro, another area way that this other organization
25 comes in is because you seized some items from the Holy Land

1 Foundation that refers to them, or what do you have?
2 Documents?

3 MS. SHAPIRO: Pictures, lots; yes.

4 THE COURT: And why would that not be relevant?

5 MR. CLINE: Actually, Your Honor, that was something
6 I meant to bring up at the end of the day. We just got these
7 pictures a few days ago maybe a week ago.

8 MS. SHAPIRO: Well, they were off the computers
9 which Ms. Hollander has had since 2002 or before.

10 MR. CLINE: I don't know when we got the computers.
11 There is a lot of stuff on the computers. These were
12 presented to us as exhibits the Government wanted to admit
13 within the last week. We are still trying to figure out
14 exactly what they are, and we are going to be filing a motion
15 on this.

16 THE COURT: Let's assume that is what the Government
17 says they are, for argument's sake.

18 MR. CLINE: Here is the thing. First of all, if
19 they were pictures of Osama bin Laden --

20 THE COURT: Let's leave a side bin Laden. I think
21 he does have different problems maybe than some of these
22 others.

23 MR. CLINE: Let's just take the easiest example. If
24 Ghassan Elashi had on his computer a big picture of Sheikh
25 Yassin and another great big picture of some other Hamas

1 leader I would be hard-pressed to say that that is not
2 relevant. But I don't think that is what we have here.

3 What we seem to have, and this is what we need to explore
4 and we haven't had a chance to explore it yet, we have
5 pictures related to Hamas that were taken off what appear to
6 be the, and I am learning this lingo as we go along and so
7 this is provisional what I am about to tell you, but it
8 appears to be cache files, which means these are things that
9 somebody who might have been surfing the internet and looking
10 at a whole bunch of stuff but not downloading anything, if you
11 are surfing the internet and you click on a picture and you
12 look at that for a second and then you think "I am not
13 interested on that," and go to the next thing, that picture is
14 stored on your computer in what is called a cache file, I
15 believe that is what it is called. And it stays there for a
16 while. It looks to us like that is what this is.

17 In other words, this isn't somebody at the Holy Land
18 Foundation downloading this stuff and saving it and thinking
19 this is important. If anybody at the Holy Land Foundation,
20 you know, on a coffee break was surfing the web and happened
21 to open up a picture of somebody in Hamas, that ends up going
22 into this cache file.

23 Now, we think that is what is going on, but we haven't
24 had a chance to explore it yet because we didn't know the
25 Government wanted to use this. That is one issue. These may

1 be just somebody surfing the web and not downloading anything,
2 nothing like that.

3 Beyond that, it is very hard to tell where these things
4 came from. We know that some of them came out of the Chicago
5 office of the Holy Land Foundation. None of the Defendants in
6 this case were located at the Chicago office, none of the
7 individual Defendants. Some came from New Jersey and some
8 came from Dallas.

9 And then there is a question of whose computer they came
10 off of. Because again, if it turns out that what we have from
11 Dallas, let's say, is somebody in the mail room who surfed the
12 web and happened to click on a few pictures of Hamas people
13 and those got stored in this temporary cache file, but didn't
14 download them or anything else, none of the Defendants did
15 this. It is very hard to see how that is relevant, or of much
16 relevance, and it is certainly going to be prejudicial.

17 On the other hand, if it turns out that I am wrong about
18 the whole cache file business and the Defendants were
19 downloading pictures of Hamas people and storing them on their
20 computers, well, that may have some relevance. I don't think
21 that is what happened.

22 THE COURT: I think Hamas issue, I will let it go to
23 the weight. I think the Government, obviously, might have a
24 different view on that than yours, and you can argue that and
25 the jury can make its own decisions, as long as it is Hamas.

1 I am really asking about the other organizations, the other
2 names, the other terrorist organizations. And from what you
3 stated, you have some information --

4 MS. SHAPIRO: The only photos, the pictures that we
5 I believe turned over, the vast majority are Hamas. There
6 might have been a couple of Nasrallah that is Hezbollah.
7 There were a bunch of bin Laden, and there were some that were
8 pictures of bus bombings, Hamas bus bombings in Israel, in
9 other words, the scene of the destruction. There were some
10 that were burning American flags, Palestinians burning
11 American flags. I think that covers it. There weren't other
12 terrorist organizations other than that.

13 THE COURT: So a few maybe of Hezbollah and then
14 some of bin Laden?

15 MS. SHAPIRO: Yes. And just to be clear, there are
16 some that came from Chicago, but Holy Land Foundation is a
17 Defendant in this case, and that was a Holy Land office in
18 Chicago. So it is clearly relevant.

19 Some of them came from New Jersey where I believe Mr.
20 Odeh was the sole representative. And a lot of them came from
21 Richardson. So it is clearly relevant as to whether they were
22 cache files or downloaded files goes to weight.

23 MS. HOLLANDER: Your Honor, let me just add, there
24 were more than 20 computers in Dallas, and probably 40
25 different employees over the years that came and went and used

1 those computers, many of whom were low level employees.

2 THE COURT: Well, I think anything that has to do
3 with Hamas, it is going to come in. That is the issue here is
4 whether they were related to Hamas. So anything that goes to
5 weight -- And I know you have your theory. Of course, they
6 have their theory. That is what the jury is going to be
7 resolving. So I don't have any real question. I think with
8 Hamas it is fairly clear cut. I am trying to focus in on some
9 of the others. I am just troubled, frankly, whether I am
10 going to let you get into anything on bin Laden.

11 MR. JACKS: Your Honor, let me make this statement.
12 As you just said, they have their position and sometimes they
13 get a little carried away, they being the Defense.

14 THE COURT: I think I have seen that maybe across --

15 MR. JACKS: I agree. I will confess to that that.
16 We all get wrapped up in our representation. But I don't
17 expect there will be any connection to this case to 9/11.

18 THE COURT: Once you start trying to connect it to
19 bin Laden, that is going to be 9/11. There is no way around
20 it.

21 MR. JACKS: I understand it. But if it is something
22 that these Defendants chose to do, or if they have it in their
23 possession, that is indicative of their state of mind, it is
24 indicative --

25 THE COURT: Well, it may be indicative of some state

1 of mind. I don't know that it is indicative to the charges
2 here. That is what we have to keep focusing on here. The
3 charges here are are they related to Hamas, and so that is
4 what we have to focus on. They may not have been related to
5 Hamas, but they may have liked bin Laden. That is just not
6 the same thing. And one doesn't lead, to me, to conclude that
7 because they may have been fans of bin Laden, or what have
8 you, somebody there, that that means they were connected to
9 Hamas.

10 And the problem is that is when you really start getting
11 into the 403 issue. Maybe it does. Maybe there is some
12 argument that you can make, "Well, they are obviously
13 connected to terrorist groups," but because of the 9/11
14 situation, and what we heard from virtually -- so many of the
15 panel members, then you start getting into a real possibility
16 of prejudice, of unfair prejudice. Obviously all this is
17 prejudicial, but the unfair prejudice, because people will
18 start linking it in to 9/11. And then they start getting mad
19 or upset and they are going to get convicted because of some
20 perceived link with bin Laden and 9/11. That should not
21 -- This case should not turn into that.

22 We told them all it wasn't connected, and it isn't. The
23 charges don't connect it. And so any evidence that I think
24 leads us there is highly suspect in my mind, and you are going
25 to have a hard time with that. But I will certainly take a

1 look at what you have.

2 But obviously before you get into anything like, I would
3 want to give them notice and let me know with bin Laden. I am
4 still -- So we are there with that one. We are still dealing
5 with these others that don't have that kind of baggage with
6 them or that kind of association with them.

7 MS. SHAPIRO: The only other things in there other
8 than bin Laden, as I said, were some pictures of Nasrallah
9 from Hezbollah. And I am not wedded to those. If that helps
10 to give up Nasrallah, I can do that.

11 THE COURT: I am still trying to work my way through
12 that and see whether that is relevant. And again, I
13 understand the relevance that you are trying to link, that
14 these people are tied into terrorist organizations. Bin Laden
15 is just so loaded that I think that is a fairly easy 403 call
16 that we don't want to go there.

17 MR. JACKS: And there is just -- As another example,
18 there is a newspaper photograph that has been cut out that was
19 seized in the New Jersey office of the Holy Land Foundation,
20 and it is a picture of three men. It is Khalid Mishal the
21 head of Hamas, Yousef Qaradawi a Sheikh, and Hassan Nasrallah
22 the head of Hezbollah, and they are together in that
23 photograph. And that was cut out of some newspaper and kept
24 in the Holy Land Foundation office in New Jersey. And the
25 fact that somebody would cut it out and keep it we believe is

1 relevant and probative.

2 THE COURT: Well, and it may be. But that is where
3 I am still struggling with trying to work my way through other
4 terrorist organizations. My ruling with respect to bin Laden
5 would still be the same. I just still think you are injecting
6 issues that we don't need to inject here. They are not
7 necessary because of the unfair prejudice that is attached to
8 that. So I think anything with respect to bin Laden, just be
9 sure you approach the bench before you get into anything that
10 has to do with bin Laden or Al Qaeda, anything like that.

11 The other one, you have got a few there from Holy Land
12 and then you say you had some items that were seized from the
13 zakat committees.

14 MS. SHAPIRO: The items from the zakat committee, my
15 memory is that they are all Hamas.

16 THE COURT: So not any from the other organizations?

17 MR. CLINE: There were a few bin Laden ones.

18 THE COURT: I have ruled on bin Laden.

19 MS. SHAPIRO: Those were the ones that were, as I
20 said the all star terrorist posters, and none of them were bin
21 Laden alone.

22 THE COURT: And the ruling with bin Laden will be
23 the same regardless of where that comes from. And so would
24 you want to get into pictures that don't have bin Laden but
25 other terrorist organizations or other leaders of terrorist

1 organizations?

2 MS. SHAPIRO: My memory is that the ones that we
3 introduced were of Hamas. Again, there might have been a
4 couple of Hezbollah leaders who were together with Hamas
5 leaders.

6 MR. CLINE: May I suggest -- We understand your
7 ruling on Hamas. We understand your ruling on bin Laden. May
8 I suggest that on the others we take them up as they come up?
9 There aren't a lot.

10 THE COURT: That is a good idea. That way we don't
11 have to --

12 MS. HOLLANDER: And I just want to kind of second
13 that, because we are still getting the Government's exhibits.
14 We got some more today, and so some others may come up that we
15 don't even know about and we just have to raise them when they
16 come up.

17 On this list, I mean, if there is anything else you want
18 us to discuss I am happy to do it. We briefed it in about as
19 much detail as we could think of at the time.

20 THE COURT: So let's just do it this way. Of
21 course, bin Laden approach the bench. And then you will
22 approach the bench if it is any other terrorist organization
23 other than Hamas. There is not that many of them, and we will
24 just take those up as you think you need to get into it.

25 So I guess I will grant the motion in limine. That is

1 the upshot of this. I will grant the motion in limine with
2 respect to terrorist organizations other than -- Of course
3 that didn't address Doctor Hoffman.

4 MR. CLINE: And Your Honor, on that one, too.

5 THE COURT: I understand that was your first
6 argument. You led up with that.

7 MR. CLINE: But I am big on context here. He is
8 going to come after Levitt. Right?

9 MR. JONAS: Much further after Levitt.

10 MR. CLINE: I think, Your Honor, it would make more
11 sense to take up -- You understand our position on the 403
12 issue. I think it would make a lot more sense to take it up
13 after you have heard Levitt.

14 THE COURT: So that doesn't look like we will be
15 getting, and you know the trial better than I know it, but we
16 won't be getting into any other terrorist organizations, then,
17 before then? Is that safe to say?

18 MR. JONAS: Doctor Levitt very briefly talks about
19 some other Palestinian rejectionist groups in connection to
20 Hamas; not a lot of detail about it. It is all contextual to
21 Hamas. For example, PLO is certainly I think relevance there.

22 MR. CLINE: I don't think that is a problem.

23 THE COURT: You don't have a problem with the
24 other Palestinian organizations?

25 MR. CLINE: The way Doctor Levitt talks about it, I

1 think that is fine.

2 THE COURT: Anything beyond that, be sure you
3 approach the bench if you think you need to get into it.

4 MS. SHAPIRO: Only in that the executive order that
5 designates Hamas also designates another number of other
6 terrorist organizations, and that was in evidence last time,
7 and I don't expect there would be an objection to that.

8 THE COURT: It doesn't do anything to link these
9 Defendants with them, so I think that would be all right.

10 All right.

11 MS. HOLLANDER: They also have another expert, Your
12 Honor, Doctor Figchel, who also I think talks about zakat
13 committees.

14 MS. SHAPIRO: Colonel Figchel, I think we advised the
15 Defense it would either be him or Avi. So right now our
16 intention is not to use Colonel Figchel.

17 MS. HOLLANDER: Okay. Thank you.

18 THE COURT: And you stated there were some others
19 you would like to have rulings on. Would you like to identify
20 those any further?

21 MS. HOLLANDER: I don't know that we need any of
22 these right now.

23 THE COURT: Did we address the indictments and
24 convictions? You are not going to go into that.

25 MR. JONAS: That is correct, Your Honor. The only

1 issue in our opinion is the experts can rely upon it.

2 THE COURT: That is right. That has been covered.

3 MS. HOLLANDER: Your Honor, one of the issues that
4 we raised was I believe the Government probably intends to
5 introduce evidence that in 2002 Israel designated certain
6 organizations as unlawful organizations, and we also think
7 that that is wholly irrelevant. It is also hearsay, raises
8 confrontation issues for the same kinds of reasons that
9 Mr. Cline raised.

10 It also was another government under entirely different
11 procedures, whatever they are. Israel actually has separate
12 procedures for how they designate terrorist organizations and
13 how they designate unlawful organizations. And it was after
14 Holy Land closed. And part of our motion in limine was to
15 exclude any reference of those, which it may be something that
16 comes up during opening statement. I can't really remember.

17 THE COURT: Do you want to address that, the Israeli
18 designation?

19 MS. SHAPIRO: They are relevant and probative for
20 the same reason that evidence past 2001 is relevant.

21 THE COURT: I agree that post 2001 evidence could be
22 relevant. If it gets too far removed, we may have an issue,
23 but I am not in agreement with your arguments that anything
24 post December 4th, 2001 is not relevant. It can be relevant.
25 But specifically what is the -- I don't -- Are you just

1 objecting to that because it is post December 2001, or are you
2 just generally saying it is not relevant?

3 MS. HOLLANDER: Well, it is not relevant. It is
4 also hearsay. I think it raises confrontation issues.

5 THE COURT: But your basis for not relevant, is it
6 solely because it was after 2001, or is there some other basis
7 for that?

8 MS. HOLLANDER: The relevance issue is that it was
9 after 2001 and it is not something that our government did.
10 It has no probative value.

11 MS. SHAPIRO: The designations are certified as
12 appropriate under --

13 THE COURT: Let's assume you get over that hurdle,
14 why is that relevant?

15 MS. SHAPIRO: It is relevant because it is the same
16 zakat committees that are in issue in the indictment.

17 THE COURT: So it is designating those committees?

18 MS. SHAPIRO: Those specific committees, at least
19 the Israeli government recognizes that Hamas when they are
20 designated is unlawful. Now, they can certainly argue as a
21 matter of weight that the jury shouldn't put much weight
22 because it is another government with other procedures, but
23 again, it is weight, not admissibility.

24 MS. HOLLANDER: It is still hearsay, Your Honor.

25 THE COURT: I will deal with it.

1 MS. HOLLANDER: And I think it raises serious
2 confrontation issues.

3 THE COURT: I understand that argument. I will give
4 you a ruling on that by Monday morning, if not tomorrow.

5 MS. HOLLANDER: I don't think there is anything else
6 that we can't raise when it comes up, unless Your Honor in
7 reviewing this wants --

8 THE COURT: No, I have reviewed it, but I think if
9 you are comfortable with that, I can -- And any events
10 occurring after December 2001, that is too broad. There are
11 certainly some things after 2001 that could shed some light,
12 and it could be circumstantial. They can always argue it. It
13 didn't start in 2002. This is obviously something that had
14 been going on. Those are things that go more to weight.

15 You can get far enough removed that maybe it starts
16 losing it probative value, but I just think you need to bring
17 that up on an item by item basis.

18 MR. CLINE: Your Honor, may I take up a couple of
19 other open issues just in the nature of updating you?

20 THE COURT: Yes.

21 MR. CLINE: There is this issue of the photos. We
22 may file a motion on those. The ones recovered from the
23 computer, we are still trying to figure out what the story is
24 with those.

25 You may recall we had a discussion of the CIPA -- our

1 fourth CIPA Section 5 notice having to do with Avi and Major
2 Lior. And if you recall, we were going to provide some
3 questions to the Government and they were going to look into
4 them.

5 We did provide the questions to the Government. I
6 understand they have been checking those out with the
7 Government of Israel, and we may -- I understand that I will
8 soon get a response to which ones are in and out, and there
9 may be issues that we need to take up.

10 MS. SHAPIRO: We have looked into those, and I do
11 owe Mr. Cline a letter on those. The vast majority of those
12 are not going to elicit classified information and they won't
13 be a problem. There were one or two things that I will spell
14 out in the letter and we can discuss them at that point.

15 MR. CLINE: And we can see where we stand.

16 THE COURT: Sure.

17 MR. CLINE: The other thing is we filed a pleading a
18 couple of days ago, I think, dealing with this discovery order
19 that Your Honor issued in August.

20 THE COURT: Yes. And I think you were getting a
21 response in today. Have you gotten a response?

22 MR. JACKS: No. It should be in by today.

23 MR. CLINE: I just wanted to make sure that didn't
24 get under the radar screen.

25 THE COURT: We were looking at it but I think

1 Jennifer talked to somebody and they said we would get a
2 response today.

3 MS. SHAPIRO: There is just one other issue. We had
4 filed a motion that essentially asks the Court to adopt Judge
5 Fish's evidentiary ruling with respect to the Defensive Shield
6 documents. Those are the documents we were discussing
7 earlier. If it is possible to rule on that prior to trial --

8 THE COURT: We have a draft order on that as well.
9 We will look into that. We will get an order out hopefully
10 tomorrow so you all will have it by Monday morning.

11 Any other issues?

12 MR. CLINE: That is it for the Defense.

13 THE COURT: Mr. Jacks?

14 MR. JONAS: I was just going to say scheduling for
15 Monday.

16 THE COURT: Yes. Monday morning we will start at
17 9:00 with the jury. Of course I will impanel them and then
18 give them their oath and give them their instructions, and
19 then we will read the indictment and get the pleas. And then
20 we will go to opening statements.

21 And who is making the opening statements?

22 MS. SHAPIRO: I will, Your Honor.

23 THE COURT: How much time are you --

24 MS. SHAPIRO: I am hoping no more than an hour.

25 THE COURT: Okay. And then do we know the order

1 over here?

2 MS. CADEDDU: Your Honor, may I just interject. I
3 don't believe we have an amended copy of the indictment that
4 has redacted the dismissed counts, so we request we be
5 provided with that.

6 MR. JONAS: Your Honor, we have one and have it
7 ready to email.

8 THE COURT: You might want to submit one to us also
9 so I can have it.

10 MS. HOLLANDER: Your Honor, we haven't actually
11 talked about order. I think there is probably no question
12 that I will go first.

13 THE COURT: How about time, at least the time. You
14 all can work out the order and let me know Monday morning, but
15 how much time? Can we do 15 minutes per party? That will be
16 about an hour and 15 minutes.

17 MS. HOLLANDER: I can't do it for 15 minutes.

18 THE COURT: I am just testing you just in case you
19 would agree to 15 minutes.

20 MS. HOLLANDER: I have done some really short
21 openings. I once did one in eight minutes. Probably 30 to 45
22 minutes. Can I have 45 minutes, and I probably won't --

23 THE COURT: Let me see where everybody else is.

24 MR. DRATEL: My opening at the last trial was eight
25 pages of transcript. I don't think I will go a page or two

1 beyond that.

2 THE COURT: How long was that, do you think,
3 time-wise?

4 MR. DRATEL: I think about 12 minutes.

5 THE COURT: You did do 15 minutes. It wasn't that
6 unreasonable. So you are at 15 minutes again.

7 MR. DRATEL: Fifteen will do it.

8 THE COURT: I will hear from everybody that is going
9 to do it.

10 MR. WESTFALL: Your Honor, may I have like 25
11 minutes?

12 THE COURT: All right. And then Ms. Moreno?

13 MS. MORENO: About 25 to 30 minutes.

14 THE COURT: Ms. Cadeddu, that leaves you.

15 MS. CADEDDU: Oh, goodness, Your Honor. How about
16 -- I don't think I used all my time last time either. I think
17 I went about 15 or 20, but can I ask for 25 and go shorter.

18 THE COURT: Okay. Let me take a look at this, and
19 if there are some changes we will email you tomorrow and let
20 me know. And let me know at some point what the order is so I
21 can just call it out as you are up.

22 MR. CLINE: May we just email you in the next couple
23 of days with that?

24 THE COURT: Sure. I guess tomorrow since Monday we
25 are -- I don't need to know until Monday morning as far as

1 order, frankly, but I will email you tomorrow on the time that
2 we settle on.

3 Anything else we need to address?

4 MR. JONAS: No, sir.

5 THE COURT: From the Defense side?

6 MR. WESTFALL: No, Your Honor.

7 THE COURT: See you Monday morning, then.

8 MR. CLINE: I am sorry. On the time, Your Honor, I
9 don't know how you contemplate doing it, but if we could have
10 a total allotment for the Defense so that we can divide it up.

11 THE COURT: For the opening?

12 MR. CLINE: Yes.

13 THE COURT: And I can do that. Let me go through
14 with what you have said and come up with a total, and then I
15 don't think it is going to be significantly different.

16 MR. CLINE: That is correct. I just -- Because if
17 we have to trim a little bit, we may try to figure out --

18 THE COURT: And I don't have a problem with that.
19 In fact I will do that.

20 Be here at 8:30 Monday morning in case anything we need
21 to take up, we will take that up so we can start promptly with
22 the jury at 9:00.

23 Yes, sir?

24 MR. DRATEL: Mr. El-Mezain has a cushion due to
25 arthritis. If he could just bring it into the courtroom

1 starting Monday.

2 THE COURT: Not a problem.

3 MS. HOLLANDER: And we will be in the other
4 courtroom. Is that right?

5 THE COURT: Yes, we will be down on 15 where we did
6 the jury impanelment on September the 4th.

7 (End of Day.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts

06/03/2009

10 _____DATE_____
11 SHAWN McROBERTS, RMR, CRR
12 FEDERAL OFFICIAL COURT REPORTER
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